

Serial No. 10/812,160

Amendment Under 37 CFR §116 dated January 19, 2005

Response to Final Rejection dated November 30, 2004

#### REMARKS/ARGUMENTS

Applicant respectfully requests reconsideration and withdrawal of the rejections set forth in the above-identified Final Rejection.

By this Amendment, independent claims 38 and 42 have been amended to recite that the multilayered film in the package consists essentially of the layers set forth in the subsequent paragraphs. In addition, claim 42 has been further clarified to include the feature of claim 38 that the multilayered film is positioned such that the protective film is away from the open portion of the container. Although this structure is implicit from the recitation that the protective film is on the second surface of the first nylon film, it is believed that the present amendment would more specifically state such structure.

Entry of this Amendment and allowance of the application are respectfully requested.

Applicant acknowledges with appreciation that many of the rejections set forth in the first Office Action have been withdrawn in the Final Rejection. The only remaining rejection of the claims are based on double patenting over claims 1-20 of U.S. Patent No. 6,447,892 to Hatley et al. or anticipation over such reference.

It is not quite certain from the Final Rejection whether all of the claims stand rejected on these grounds. It is noted that in the "Repeated Rejection" section, there is mention of the double patenting rejection of claims 38-41. There is also mention of claims 46-48, but it is not stated whether these claims are likewise rejected. Furthermore, claims 42-45 are not mentioned in this rejection.

Concerning the 35 USC 102 (e) rejection, it was stated that the rejection of claims 38-42 was repeated. There is also mention of claims 43-48, although there does not appear to be an explicit rejection of such claims.

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However, for purposes of these remarks it is presumed that claims 38-41 and 46-48 stand rejected on the ground of double patenting and that all of the claims stand rejected on the ground of anticipation.

To briefly summarize the present invention, Applicant claims a food package which includes a container having an open portion and a multilayered film sealing the open portion. The multilayered film is an antifog/barrier laminate useful in meat packaging, and in particular packaging in a controlled atmosphere environment. The film itself is claimed in the parent application, which has issued as USP 6,726,968.

In the construction of the package of this invention, an antifog composition is included within or coated upon a sealant film which faces the open end of the package. A nylon film (claim 38) or a nylon film/EVOH film/nylon film structure (claim 42) faces away from the sealant film and is covered with a protective film. The protective film faces the exterior of the package, away from the open portion of the package, and forms the exterior of the multilayered film lidding. The claimed protective film is selected from the group consisting of polyvinylidene chloride, polyurethanes, amine modified polyurethanes, epoxies, polyesters, acrylics, polyols and combinations thereof, and dependent claims specify polyvinylidene chloride and polyurethane.

It is respectfully submitted that Hatley et al. does not teach or suggest the herein-claimed package. The Final Rejection recognizes that Hatley et al. do not disclose a protective film *per se*, but states that the multi-layer film of Hatley et al. contains a layer made with the same material as the disclosed protective layer which would perform the same duties as the claimed layer. However, it is respectfully submitted that this is not the case since the layer considered to be the "protective layer" in Hatley et al. is either buried in its structure or is part of polyolefin layer, and is not on the exterior of the multilayered film. It is respectfully submitted that Hatley et al. do not disclose a structure which consists essentially of the recited layers of film as now claimed herein.

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Although Hatley et al. disclose a lidding film, their multilayered structure includes a nylon film/EVOH film/nylon film combination, and a polyolefin film attached to one of the nylon film layers, with an antifog composition on the exposed surface of the polyolefin film or incorporated therein. In the rejection of the claims, it is stated at page 4 with respect to both grounds of rejection that "a protective film of polyvinylidene chloride (Column 8, lines 20-24) or polyurethane (Column 5, line 35)" is disclosed in Hatley et al.

With respect to the reference to polyvinylidene chloride films, it is pointed out that Hatley et al. state at Column 8, lines 22-24 that:

"Suitable oxygen barrier films include ethylene vinyl alcohol, polyvinyl alcohol, polyvinylidene chloride and combinations thereof."

Thus it is clear from Column 8, lines 6-24 that the composite film has an "oxygen barrier" in the interior portions of the film, and not as an exterior surface. Thus, even if a layer of polyvinylidene chloride were used instead of EVOH in the Hatley et al. structure, it would still be an interior layer and not an outer protective layer as claimed herein.

With regard to the statement concerning the use of a polyurethane, it is respectfully submitted that the cited portion of Hatley et al. refers to the polyolefin layer and not a separate layer. Starting at Column 5, line 11, Hatley et al. describe suitable polyolefins that may be used in the invention. At the end of the paragraph it is stated that:

"Copolymers of olefins and other polymers include [sic] such as polyvinyl chloride, polystyrene and polyurethane, etc., and mixtures of these."

Thus, it is clear that the only reference to polyurethanes is as part of the polyolefin layer. As such, it is submitted that Hatley et al. does not disclose a separate layer of polyurethane that acts as a protective layer and faces exterior of the opening of a package. Since the polyolefin layer of Hatley et al. contains the antifog composition, it faces into the opening of the package, as opposed to an outwardly facing protective layer. Thus any polyurethane present in the structure of Hatley et al.

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would likewise face the interior of the package, in contradistinction to the invention claimed in independent claims 38 and 42, and the claims dependent thereon.

Therefore, Applicant respectfully submits with respect to both the double patenting rejection and the anticipation rejection that Hatley et al. does not teach or suggest the invention as claimed herein.

Moreover, the double patenting rejection was based on claims 1-20 of Hatley et al. The sole independent claim of these claims is claim 1, which recites a multilayered film which consists essentially of a nylon film attached to a surface of an EVOH film and another nylon film attached to another surface of the EVOH film, and a polyolefin film attached to one of the nylon films by an adhesive, with an antifog composition being on the surface of or in the polyolefin layer. In distinction to claim 1 of Hatley et al. and claims 2-20 dependent thereon, independent claims 38 and 42 of the present application call for an additional layer of a protective film on the second surface of the first nylon film. Independent claim 1 of Hatley et al. does not recite an additional layer of a protective film, much less the specific protective films claimed in claims 38 and 42 (and the claims dependent thereon). Therefore, it is respectfully submitted that in addition to the arguments presented above, the present claims certainly define over claims 1-20 of the Hatley et al. patent such that the double patenting rejection of the claims of this application is not warranted.

In summary, Applicant respectfully submits that claims 38-48 as presented call for a package formed from a container having a multilayered film sealing its open portion, with the multilayered film consisting essentially of the stated layers. The stated layers are (a) a first nylon layer (and, claims 42 recites, (b) an EVOH layer and (c) a second nylon layer), (d) a polyethylene sealant film (with an antifog composition) and (e) a protective film selected from a specific group of polymers and which film faces away from the open portion of the container. It is respectfully submitted that the Hatley et al. patent does not disclose or suggest a package which has the claimed lidding structure.

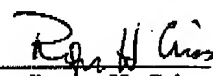
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It is therefore most respectfully submitted that in view of the foregoing remarks and amendments, claims 38-48 are indeed patentable over the disclosure and claims of Hatley et al. and that any rejection over Hatley et al. (whether on the ground of double patenting or anticipation or any other ground) is not warranted.

Accordingly, Applicant respectfully requests entry of this Amendment, reconsideration of the rejections and allowance of all of the claims. An early notification to that effect and allowance of the application are respectfully requested. Alternatively, Applicant respectfully requests entry of this Amendment for purposes of appeal.

Should the Examiner believe that a discussion with Applicant's attorney would in any way advance the prosecution of this application, she is respectfully requested to telephone the undersigned.

Respectfully submitted,  
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